

Supreme Court, U.S.  
FILED  
SEP 8 1997  
Docket No. 96-1395  
CLERK

(8)

IN THE  
**Supreme Court of the United States**

**October Term, 1996**

**JAMES B. KING, DIRECTOR, OFFICE OF  
PERSONNEL MANAGEMENT,**

Petitioner,

v.

**LESTER E. ERICKSON, JR., ET AL.**

**JAMES B. KING, DIRECTOR, OFFICE OF  
PERSONNEL MANAGEMENT,**

Petitioner

v.

**HARRY R. McMANUS, ET AL.**

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

**RESPONDENT KYE'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

**WHETHER IT IS PERMISSIBLE FOR  
A FEDERAL AGENCY TO  
SEPARATELY CHARGE AN  
EMPLOYEE WITH MAKING FALSE  
STATEMENTS DURING AN AGENCY  
INVESTIGATION WHEN THE  
EMPLOYEE DENIES THE  
MISCONDUCT AND THE AGENCY  
CHARGES THE EMPLOYEE WITH  
THE UNDERLYING MISCONDUCT.**

### **STATEMENT REQUIRED BY RULE 29.6**

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

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*ON WRIT OF CERTIORARI TO THE  
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**RESPONDENT KYE'S BRIEF IN OPPOSITION**

Pursuant to Rule 15 of the Court's rules, Respondent Sharon Kye, respectfully files this brief in opposition to the Office of Personnel Management's Brief for the Petitioner.

**CITATIONS OF OPINIONS AND  
JUDGEMENTS DELIVERED BY THE  
COURTS BELOW AND NOTICE THAT  
JURISDICTION OF THIS COURT IS  
CORRECTLY PRESENTED BY PETITIONER**

The decision of the United States Court of Appeals for the Federal Circuit is reported as King v. Erickson, et. al., 89 F3d 1575 (Fed. Cir. 1996). The decision of the Merit Systems Protection Board is Kye v. Defense Logistics Agency, 64 MSPR 570 (1994). Jurisdiction is correctly presented by petitioners.

**STATEMENT OF THE CASE**

The issue arises from multiple disciplinary proceedings against government employees. In the case of Respondent Kye, the Administrative Judge sustained four of the original six charges of misconduct and upheld Respondent Kye's removal. Pet. App., p. 60a.<sup>1</sup> Respondent Kye appealed to the Merit Systems Protection Board (MSPB or Board), who upheld three of the four remaining charges, but reversed the charge of providing false information in an official investigation, based on *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), which followed the ruling of *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). Pet. App., p. 64a. The Board also mitigated the

penalty from removal to a 45-day suspension, finding it to be "the *maximum* reasonable penalty for the sustained charges." *Id.* (emphasis added). The Federal Circuit affirmed the decision. Pet. App., p. 23a.

**REASONS FOR AFFIRMING THE  
DECISION OF THE COURT OF APPEALS**

**I. THE DECISION OF THE COURT OF APPEALS REQUIRES THE GOVERNMENT TO ACT WITHIN THE CONFINES OF THE UNITED STATES CONSTITUTION.**

The Constitution affords every person in the United States due process before the government can deprive him or her of life, liberty or property. For government employees, due process includes the right to notice and a meaningful opportunity to respond to charges brought against them by the government. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). See also, 5 U.S.C. § 7513 (1994). The Petitioner seeks to deny federal employees a meaningful opportunity to respond to charges, arguing that the decision of the Court of Appeals which permits an employee to deny the charges and call for proof creates a right to lie for the employees. Pet. Brief, p. 19. In fact, the holding of the Court of Appeals protects the rights of the employee, under both the fourth and fifth amendments.

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<sup>1</sup>"Pet. App. p. \_\_\_\_" refers to the Appendix filed by Appellant in the Petition for Writ of Certiorari in this case.

The Court of Appeals in *Grubka* applied the term

"plead[ing] not guilty" to the civil employee who denies charges of misconduct brought against him or her by the government. *Grubka*, 858 F.2d at 1575; See n. 2 for quote. A criminal defendant who pleads not guilty cannot, based solely on the fact that she pleaded not guilty, be charged with making false statements when she is found guilty by a jury. To allow such "extra" charge would effectively eliminate the protections of the Fifth Amendment against self-incrimination. The Court in *Grubka* held that requiring an employee to incriminate himself or herself by admitting to the alleged misconduct charged against him or her would require the court "[t]o hold that the rule violates the provisions of the Fifth Amendment to the Constitution against self-incrimination." *Grubka*, 858 F.2d at 1575. This Court has applied the Fifth Amendment self-incrimination protection to civil proceedings, *Id.*, and civil employees are afforded the same protection. Civil employees do not have the right to remain silent; they can be charged with failure to assist in an investigation. However, federal employees have protection against self-incrimination, and requiring them to admit to misconduct or face additional charges is thus violative of the Constitution.

**II. THIS COURT HAS NEVER ALLOWED THE GOVERNMENT UNRESTRICTED RIGHTS REGARDING STATEMENTS MADE DURING INVESTIGATIONS.**

Petitioner misstates the question presented to the Court. The question is not whether or not the government can sanction an employee for making false statements, but whether or not the sanctions can come in the form of a separate charge from that of the underlying offense.

Petitioner cites *United States v. Dunnigan*, 507 U.S. 87 (1993) as precedent for upholding the government's right to charge the employee with both charges. Pet. Brief, p. 23. However, *Dunnigan* is a criminal case in which the defendant was found guilty of perjury and the sentencing guidelines provided an increased sentence for the underlying offense based on finding the defendant guilty of perjury. *Dunnigan*, 507 at 96 (emphasis added).

Two things should be noted of *Dunnigan*. First, the court was not addressing the situation of an additional, separate charge being brought against the defendant for the false statements. The Court had before it the issue of whether or not a sentence for one offense could be increased based on a finding of perjury. Respondent concedes that whether or not an employee admits to the misconduct is properly addressed when deciding the reasonableness of the penalty imposed by the agency under the factors articulated in *Douglas v.*

*Veterans Administration*, 5 M.S.P.R. 280 (1981). *See*, Respondent Kye's Brief in Opposition to the Office Of Personnel Management's Petition for Writ of Certiorari, p. 9.

Second, *Dunnigan* addresses statements made under oath which were proven, beyond a reasonable doubt, to be perjury. While the sentencing guidelines which were at issue in *Dunnigan* apply also to statements made during investigations, *See*, Petition, n.6; Pet. Brief, n.6, the application of the guidelines to out of court statements is conditioned on being "materially false . . . that significantly obstruct or impede[] the official investigation or prosecution." *Id.*, citing Guidelines § 3C1.1 & Application Note 3(g). Even in petitioner's "supporting" case, the use of false statements only as a basis for increasing the penalty for conviction of underlying misconduct is not without restraint. There has never been any assertion that the charged false statements by Kye would rise to the level of impeding the investigation.

### **III. THE PETITIONER MISINTERPRETS THE HOLDING OF THE COURT OF APPEALS AS CREATING A RIGHT TO LIE FOR THE EMPLOYEES.**

The Petitioner misinterprets the Court of Appeals' holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying

facts relating to that other charge," as creating a "right to lie" for the employee. Pet. Brief, p. 13. Such an interpretation is unfounded, and in fact addressed by the Court of Appeals, which held, "[t]his does not mean, however, that an employee has a right to lie." Pet. App., p. 17a. The Court of Appeals separates an employee's right to "deny the charges and the underlying facts" from making "false stories" or "telling tall tales." *Id.* Petitioner argues that the line between the two is indistinguishable. This line is no less distinguishable than the line created by the guidelines at issue in *Dunnigan*, *supra*. False stories and tall tales are material misrepresentations which significantly obstruct or impede an investigation. Such statements "go beyond denial and defense." Pet. App., p. 17a. The concerns of the Petitioner are addressed by the limitation that only denials of misconduct and the underlying facts are protected from further charges, not statements which go beyond denial and defense. The Petitioner's contention that the ruling would give federal employees "substantial latitude to make false statements" is simply unfounded. Additionally, in the near ten years since *Grubka*, the problem of ambiguity of the right to deny alleged misconduct has not once been an issue in the courts, and has been applied without incident. *See, Beverly v. United States Postal Service*, 136 F.2d 136 (1990) (A second charge for false statements based on a denial of charges dismissed as improper by the administrative judge in initial hearing, affirmed by court of appeals).

In the case of Respondent Kye, the "false statements" of which Kye is accused did not materially nor significantly obstruct or impede the investigation. In fact, the statements by Respondent Kye did not obstruct the investigation into the unauthorized charges at all. The statements did not impede the investigators from gathering independent information about the charges and establishing where, when and how the charges were made. Respondent Kye stated that she had not made the credit card charges, and did not have the card in her control when the charges were made. This statement did not lead the agency investigation on any avenues other than those which it would have otherwise pursued: investigating when the charges were made; obtaining all information about the charges from the establishments at which the charges were made; determining what the charge amounts were. In fact, the agency was able to obtain signature information on one of the charges which led to the Board sustaining one of the misconduct charges against Respondent Kye.

Petitioner further argues that to allow an employee to make false statements in the form of a denial of charges is inconsistent with holding an employee responsible for making false statements about another employee in the course of an investigation. Pet. Brief, p. 22. However, in the case of an employee who makes false statements about another employee, the statements rise to a material level, and obstruct the investigation. If the employee points blame at an employee he or she knows to be innocent of the alleged misconduct or away from an employee he or she knows to have committed the misconduct, the investigation is impeded and

obstructed away from the guilty employee. Also, in the case of investigating another employee, there are no concerns with violating a person's rights against self-incrimination.

#### IV. THE DUE PROCESS RIGHTS OF THE EMPLOYEES ARE JEOPARDIZED BY APPELLANT'S POSITION.

A federal government employee has a property interest in his or her employment with the government, and as such, the federal government must provide due process to its employee before terminating him or her. *Board of Regents v. Roth*, 408 U.S. 564 (1972); See also, 5 U.S.C. § 7513 (1994). Government employees are entitled to, among other things, an opportunity to respond to the charges on which the government has based a decision to terminate. 5 U.S.C. § 7513(b) (1994). The Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), held the opportunity must be meaningful, not merely pretextual. *Id.* at 546. The Petitioner argues that procedural due process is not at issue in charging an employee with both the misconduct and the false information charges. However, the Court of Appeals in the case at bar, relying on *Grubka*, held in order to protect the employee's meaningful opportunity to respond to charged misconduct, an agency cannot charge an employee with making false statements during an agency

investigation when the employee denies the misconduct and the agency charges the employee with the underlying misconduct. Pet. App., p. 21a.

To allow the agency to charge an employee with both charges any time he or she denies the charged misconduct, effectively and automatically creates a second charge, unless the employee admits to the misconduct with which he or she is charged. Pet. App., p. 17a, 29a. Thus, any time an employee contests an agency's action or articulates a different version of truth than the agency's version, that employee risks an additional or subsequent falsification charge if every factual finding (based on a mere preponderance) is not resolved as she asserts. The charge of falsification is of such magnitude and potential penalty that few employees would risk the consequences, which include termination, for the sake of availing themselves of their right to respond to the misconduct charged against them. As such, the employee's right to respond to charges would no longer be meaningful, a violation of the Constitution and the employee's procedural due process rights would be constructively denied.

The Petitioner would have the Court believe that employees have nothing to fear because only valid charges are brought, and if the employee is telling the truth, then the underlying charges will not be sustained. This theory decries the basis for the country's entire justice system. Investigation of past events is not a perfect science; mistaken identification, misinformation and accusing the innocent occur on a daily basis. In addition, individuals might have a technical basis for

denying a suspiciously or unfairly worded agency charge and requiring proof on the allegation. It is for these reasons that our justice system holds the accused innocent until proven guilty and allows the accused to plead not guilty, thereby forcing the accuser to prove guilt.<sup>2</sup>

The level of proof required of the agency is by a preponderance of the evidence before an administrative judge with different rules of procedure and evidence than in a regular court. It is the agency's duty to present enough evidence to support the burden. Not allowing an employee to deny allegations of misconduct would place the employee in the position of assisting the agency in proving the charges against her while at the same time trying to defend against the charges. Such a position is irrational and illogical.

The Petitioner also fails to address the type of misstatement of which Respondent Kye stands accused. The false information she was charged with centered around the date upon which she regained control of her

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<sup>2</sup> "A person charged with an offense can deny the charge and plead not guilty, either because he is not or to force the charging party to prove the charge. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge." *Grubka*, 858 F.2d at 1575. *Grubka* involves a federal employee who was accused of misconduct, denied the misconduct, gave an explanation of what happened, and was subsequently charged with making false statements during an agency investigation. The charge was dismissed by the court of appeals. *Id.* The facts in *Grubka* are analogous and nearly on point to the facts before the Court today.

government issued Diner's Club card. Pet. App., p. 22a, 23a. Respondent admitted that she was confused as to when she was in control of the card and the date on which she destroyed it. Respondent tried to correct the misstatement during the course of the investigation. Under the theory set forth by the Petitioner, an innocent misstatement by an employee upon being confronted with charges, regardless of subsequent efforts to assist in the investigation or correct the error, could result in termination of the employee. As previously stated, such potential for serious consequences would "chill" an employee's right to respond to charges (except by way of admitting to them), a right which is guaranteed by the United States Constitution and would further prevent them from correcting errors which later come to light through additional information for fear of a removal action.

#### **V. PETITIONER INADEQUATELY APPLIES THE MATTHEWS V. ELDRIDGE TEST.**

Appellant repeatedly cites the test which is used to determine whether governmental procedures adequate protect an employee's due process rights:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

substitute safeguards; and finally the Government's interest.

*Gilbert v. Homar*, 117 S.Ct. 1807, 1812 (1997) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976)). However, Petitioner never adequately applies the test to all aspects of this case.

**A. Federal employees' property interest in continued federal employment is at great risk if they lose the right against compelled self-incrimination during investigation of alleged misconduct.**

As stated before, Petitioner would have the Court believe that there is no risk associated with the charging of federal employees for making false statements during investigations along with charging them with the underlying charge. However, as held by the Court of Appeals, allowing the government to do so would create a chilling effect on the employees' exercise of due process rights. In essence, every charge would become a potential removal situation. The most minor of offenses would be open to the addendum of a second charge of making false statements, which would carry a far greater penalty, including removal. Therefore, even the employee charged with stealing a pencil would be subject to removal if she denied the charge. Because Petitioner seeks to make this a separate charge,

independent from the underlying charge, the employee is subject to removal regardless of whether the underlying charge is mitigated or not.

While it may be true (as Petitioner asserts) that criminals may not be compelled to falsely self-condemn, the stakes for criminals are different than for employees. As in the example cited above, the penalty for stealing a pencil may be relatively inconsequential, whereas the penalty for making false statements could be removal. An accused criminal does not face such a dichotomy of penalties. If the criminal self-incriminates, there is still the threat of a great intrusion into his or her life, whether by probation, negative public records, trouble with future employment opportunities, limits of social freedom for a period of time, and the like. The risk of trying to prevail on the underlying charge is not increased by the inclusion of the false statements charge; the resultant degree of penalty is. For an employee, the decision whether or not to deny the charge can be all or nothing; remain employed by admitting the alleged misconduct or risk removal by defending oneself. For an accused criminal, the decision is a matter of how much of a penalty, which is certain, is she willing to endure.

#### **B. The Value of Additional Procedures Far Outweighs The Costs.**

The only cost for the government associated with the restraint against charging the employee with separate charges for making false statements during an

investigation is having to honor the rights of the individual as set forth by the Constitution.

As previously stated, there is no question that whether or not the employee made false statements is a part of the determination of appropriate penalty under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The statements are usable in determining appropriate penalty within the predetermined range for the underlying offense. What Petitioner seeks to be able to do is to go beyond the scope of the predetermined appropriate penalties by using the statements as a separate charge, carrying their own range of penalties. The government is required to prove the underlying offense; at that point, the statements are used to determine an appropriate penalty.

Conversely, what the restriction would do is disallow the government from terminating an employee for a minor misconduct based on his or her defense against such charge. Surely the cost of not doing so is far outweighed by the potential increase in administrative costs as employees are forced to fight false statement charges through the administrative grievance procedure so as to maintain their employment as a result of defending themselves against frivolous and minute acts of misconduct.

**C. The Government's Interest Would Best Be Served by Such a Restriction.**

One of the government's interests presumably is to avoid inefficiency in the management of its employers. As previously stated, allowing the government to charge separately for statements made during an investigation opens every investigation of employee misconduct into a potential removal case. Undoubtedly an employee will fight hardest to keep his or her job. Therefore, every disciplinary action would be a potentially long, involved and expensive administrative process as the employee sought to exhaust every possible avenue of relief. The cost of using the statements as a mitigating factor as opposed to the cost of using the statements as a separate charge are on such opposite ends of the spectrum that they are nearly unable to be compared. There is no question the benefit of the restriction far outweigh the costs, and the interest of the government is best served by such restrictions.

**VI. PETITIONER EMBARKS DOWN THE SLIPPERY SLOPE, ADDRESSING ISSUES NOT PRESENTLY BEFORE THE COURT.**

Petitioner asserts that should the Court uphold the ruling of the Court of Appeals, it will effectively hold unconstitutional other disciplinary systems. Pet Brief, p. 38. Such is not the case. The only issue before the Court is the decision of the Court of Appeals and its impact on the federal government's disciplinary

procedures. Whether or not state or local public employees have been treated fairly is NOT at issue. Moreover, just because other systems use similar methods as those proposed by petitioner in this case does not automatically mean they are correct or constitutional. As established in *Washington v. Harper*, 494 U.S. 210 (1990), "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interest at stake in the particular case." *Id.* at 229. Petitioner attempts to cloud the issue of the case at bar by creating a slippery slope analysis to address other entities' disciplinary processes.

In as much as the cases and scenarios cited relate to the present case, each involves actions delineated by the Court of Appeals as more than "a denial of the charges and the underlying facts," falling outside the protection afforded by the decision of the Court of Appeals.

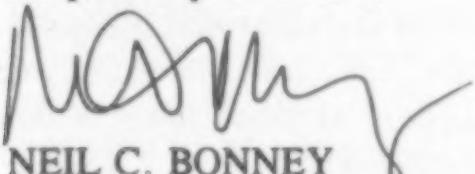
The decision of the Board and the Court of Appeals is based on sound precedent, Constitutional principles, and administrative procedure principles. No negative examples of the application of this rule have been cited since *Grubka* and there is no need for a change in the current state of the law. There are no unjustified constitutional restraints on the government when it is required to afford its employees the same rights protected by the Constitution to other accused persons, whether in a criminal or civil context. The procedural restraints, when balanced against the costs of implementing the restraints, are valuable far beyond any

cost associated with them. As such, the interests of both the employee and the government are best served by not allowing the government to separately charge the employee with making false statements regarding allegations of misconduct.

### CONCLUSION

The decision of the Court of Appeals should be  
**AFFIRMED.**

Respectfully submitted.



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SEPTEMBER 1997